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In the Supreme Court

of the United States

OCTOBER TERM, 1950

No. 759

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY IT PLEASE THE COURT:

The petitioner, Haleston Drug Stores, Inc., respectfully petitions this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a decree dismissing the petition of Haleston Drug Stores, Inc., for review of an order of

the National Labor Relations Board affirming an order of the Trial Examiner dismissing an unfair labor practice complaint issued by the General Counsel of the National Labor Relations Board.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner operates four retail drug stores in Portland, Oregon.

In October, 1948, petitioner filed a petition for Certification of Representatives with the National Labor Relations Board designating a named union as one claiming recognition.

In March, 1949, petitioner filed an amended charge against other unions alleging said unions were guilty of an unfair labor practice under Sec. 8(B)(2) of the National Labor Relations Act (29 U.S.C. 158(B)(2), in attempting to force petitioner to sign a collective bargaining agreement containing illegal union security provisions and thereby attempting to cause petitioner to discriminate against his employees in violation of Section 8(A)(3) of the National Labor Relations Act (R. 2). (29 U.S.C. 158(A)(3)).

The General Counsel thereupon issued an unfair labor practice complaint (R. 5).

In April, 1949, after a hearing in the representation case, the National Labor Relations Board made findings respecting petitioner's business, and then, without de-

ciding whether or not the petitioner's operation affected commerce within the meaning of the National Labor Relations Act, dismissed the petition on the ground that it would not effectuate the policies of the Act to assert jurisdiction inasmuch as the petitioner's business was essentially local in character (R. 68).

In August, 1949, in the unfair labor practice case, without a hearing, the trial examiner granted the union's motion to dismiss the complaint predicating the dismissal order on the ruling of the Board in the representation case (R. 16). The National Labor Relations Board, on review of the order of the Trial Examiner dismissing the unfair labor practice complaint, assumed as true facts petitioner offered to prove to the effect that purchases of petitioner amounted to $323,938.00, of which approximately 20% were purchased and shipped from concerns and points outside the State of Oregon; approximately 23% were purchased from firms outside the State of Oregon but supplied from warehouses located inside the State of Oregon; approximately 16% were purchased from local salesmen but shipped from points outside the State of Oregon; approximately 40% were mainly local products purchased from local suppliers and that sales totaled $478,108.00 and were all made locally (R. 19, 25). The Board affirmed the Trial Examiner's order dismissing the complaint on the ground that the National Labor Relations Board has discretionary authority under the National Labor Relations Act to dismiss a complaint for policy reasons and such discretion was properly exercised where the National Labor Relations Board finds that interruption of the

employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce (R. 33).

Petitioner then filed a petition in the United States Court of Appeals for the Ninth Circuit for a review of the decision and order of the National Labor Relations Board affirming the Trial Examiner's order dismissing the unfair labor practice complaint (R. 71).

The Court of Appeals, after a hearing, dismissed the petition for review on the ground that the National Labor Relations Board, notwithstanding the existence of jurisdiction, has discretionary authority to dismiss unfair labor practice complaints on policy grounds (R. 83).

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decree in this case on February 15, 1951 (R. 92).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), to-wit:

> "Cases in the Courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such

appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928."

enacted pursuant to Article III, Section 2 of the Constitution of the United States.

The case was properly before the United States Court of Appeals for the Ninth Circuit.

The National Labor Relations Act, Section 10 (f) as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 160 (f)) states:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the

same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

This section confers jurisdiction on the United States Court of Appeals for the Ninth Circuit. This jurisdiction is exclusive. *Le Baron v. Kern County Farm Labor Union,* 80 F. Supp. 15.

Petitioner is a "person aggrieved", within the meaning of Section 10 (f) of the Act, by the dismissal of the complaint because petitioner has not obtained the relief sought in his charge against the union. *Albrecht v. N.L.R.B.,* (C.A. 7, 1950) 181 Fed. (2d) 652.

The order of the Board dismissing the complaint is a "final order" within the meaning of Section 10 (f) of the Act. The order does fix the status of the parties in relation to the National Labor Relations Act for it results in denying petitioner the benefits provided by provisions of the Act designed to eliminate obstructions to the free flow of commerce. The order is not a stage in an incomplete process of administrative adjudication. The dismissal order grants an immunity to the parties complained against and imposes a correlative disability on petitioner thereby fixing the existing and future status under the Act of petitioner, his employees and the union. The order establishes the legal rights and relationships of petitioner and the parties complained against.

A judgment is understood to be final if it puts an end to the particular suit in which it is rendered, whether it finally determines the rights of the parties or not.

Weston v. City Council of Charleston, 27 U. S. 448 (1829); *U. S. v. Wallace and Tiernan Co.,* 336 U.S. 793, 69 S. Ct. 824, 93 L. Ed. 1042.

The Board's order was one "denying in whole" the relief sought. *Albrecht v. N.L.R.B.* (supra); *General Drivers, Chauffeurs and Helpers Local 886, AFL v. N.L.R.B.,* (C.A. 10) 179 Fed. (2d) 492; *Lincourt v. N.L.R.B.,* (C.A. 1) 170 Fed. (2d) 306; *Jacobsen v. N.L. R.B.,* (C.A. 3) 130 Fed. (2d) 96.

Petitioner transacts business in Portland, Oregon (R. 68).

Under the provisions in Section 10 (f) (supra) providing for review in the Court of Appeals for a final order of the Board, it is provided that the Court (Court of Appeals) shall proceed in the same manner as in the case of an application by the Board under Subsection (e).

The National Labor Relations Act, Section 10 (e) as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 160 (e)) states in part:

> " . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as

provided in sections 239 and 240 of the Judicial Code, as amended, (U.S.C., title 28, Secs. 346 and 347)."

This section further confirms the jurisdiction of the Supreme Court of the United States to review the decree of the Court of Appeals under Sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, Sections 346 and 347) (Now Title 28, U.S.C., Section 1254).

QUESTION PRESENTED

The question is whether or not the National Labor Relations Board, notwithstanding the existence of jurisdiction, has discretionary authority to dismiss unfair labor practice complaints issued by the General Counsel of the National Labor Relations Board on the ground that assertion of jurisdiction would not effectuate the policy of the National Labor Relations Act.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Court of Appeals involves an important question of Federal law which has not been, but should be, settled by this Court (Supreme Court Rule 38 (5) (b)). The construction and interpretation of the Labor Management Relations Act, 1947, which upholds this discretion in the Board, results in government by man not by law.

2. The decision is in conflict with the principles enunciated in the decision of the Court of Appeals for the Third Circuit, concerning the same rights, in the case of *Jacobsen v. N.L.R.B.*, 120 Fed. (2d) 96 (1941). (Supreme Court Rule 38 (5) (b)).

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Conrt, directed to the U. S. Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said U. S. Court of Appeals had in the case numbered and entitled on its docket, No. 12412, HALESTON DRUG STORES, INC., Appellant (Petitioner), vs. NATIONAL LABOR RELATIONS BOARD, Appellee (Respondent), to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of said U. S. Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated May 3, 1951.

HALESTON DRUG STORES, INC.,
By Wilber Henderson,
Counsel for Petitioner.